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Via FedEx (Overnight Delivery)
Bureau of Land Management
Colorado State Office
2850 Youngfield St.
Lakewood, Colorado 80215

2017 APR -7 AM 10:

Re: Shadow Mountain Ranch Property Owners Association Protest and Statement of Reasons Regarding the June 8, 2017 Oil and Gas Lease Sale

To Whom It May Concern:

This office represents the Shadow Mountain Ranch Property Owners Association, Inc. ("Shadow Mountain") with respect to the Colorado Bureau of Land Management ("BLM") June 8, 2017 oil and gas lease sale. We are submitting this correspondence on behalf of Shadow Mountain in protest of the BLM's "Notice of Competitive Oil and Gas Internet-Based Lease Sale" (March 10, 2017) ("Lease Sale Notice") and "Final Environmental Assessment for the June 8, 2017 Competitive Oil and Gas Lease Sale, DOI-BLM-CO-NO5-2016-0099-EA" (the "EA"), pursuant to 43 CFR 3120.1-3 and 43 CFR § 4.450-2. Members of Shadow Mountain own the surface estate overlying portions of BLM lease parcels COC-78289, COC-78295 and COC-78296 (the "Shadow Mountain Parcels"). Shadow Mountain is filing this protest with respect to the inclusion in the lease sale of the Shadow Mountain Parcels. Shadow Mountain's address is P.O. Box 637, Granby, Colorado 80446.

Representatives from Shadow Mountain met with BLM officials on February 28, 2017 to discuss the June 8, 2017 oil and gas lease sale (the "Sale"). During this meeting, which occurred prior to the release of the EA, Shadow Mountain provided comments to the BLM regarding the resources present on the Shadow Mountain Parcels. While Shadow Mountain greatly appreciated this meeting and the resulting stipulations added to the Shadow Mountain Parcels, the BLM has not still conducted a sufficient environmental analysis as required by its governing law. As explained further below, a proper consideration of the laws and policies governing the BLM's oil and gas leasing process necessitates the outright withdrawal of the Shadow Mountain Parcels from the lease sale. At a minimum, the BLM must defer the parcels from leasing so that the BLM can perform the required analysis and add necessary stipulations.

I. STATEMENT OF REASONS

The BLM is required by both law and policy to take certain considerations into account when determining whether to make a parcel available for lease. *See* BLM Instruction Memorandum 2010-117 ("IM 2010-117"); *see also* the National Environmental Policy Act

("NEPA") (42 U.S.C. § 4331). Among other things, the BLM must consider: (1) whether existing constraints make access to and/or development of parcels operationally infeasible; and (2) whether the non-mineral value of a parcel outweighs its potential mineral development value. Moreover, the BLM is required by NEPA to consider a reasonable range of alternatives, add required stipulations and conduct a site-specific analysis to determine the impacts of oil and gas development, all prior to lease issuance. The BLM has failed not only to take the required considerations into account, but also to perform an adequate NEPA analysis.

A. The BLM Failed to Consider the Fact that Existing Constraints Make Access to the Subject Parcels Operationally Infeasible

The BLM is required to consider whether constraints make "access to and/or development of the parcel . . . operationally infeasible." *See* IM 2010-117 at III.C.4. The BLM is required to take this consideration into account "when determining the availability of parcels for lease." *See id.* A proper consideration of the lack of access throughout the Shadow Mountain Parcels makes clear that the Shadow Mountain Parcels should not be made available for leasing.

First, there are the only two roads that provide access off of HWY 125 to the Shadow Mountain Parcels (CR 408W and 4081). Shadow Mountain has already made clear that it will not make available these private roads for oil and gas development. Moreover, a federal oil and gas lessee does not possess a private right of condemnation to cross private lands to access mineral rights leased from the federal government. *Coquina Oil Corp. v. Harry Kourlis Ranch,* 643 P.2d 519 (Colo.1982)("while the federal government may be able to condemn an access route over private lands for oil and gas development, a private lessee cannot."). And second, even if a lessee had a right over the surface of the Shadow Mountain Parcels, NSO stipulations already cover 92% of Parcel COC78289, 96% of Parcel COC78295 and 86% of Parcel COC78296. *See* the EA at Table 3-21. Thus, independent of the lack of public access routes, an oil and gas lessee simply cannot access the Shadow Mountain Parcels based on existing NSO stipulations.

In the EA, the BLM never considers this lack of access to determine whether the Shadow Mountain Parcels should be made available for lease as required by IM 2010-117.[1] Rather, the BLM merely states that "[t]he lease parcels have a mix of access available... [and] vehicle traffic may go through both on-parcel and neighboring surface owners." *See* the EA at 3.4.4.1. Contrary to the BLM's statement, however, vehicle traffic may not go through the Shadow Mountain Parcels as the roads within the parcels are all private (and will not be made available for leasing). The BLM also never considers how access is feasible given the vast NSO stipulations that cover nearly the entirety of the Shadow Mountain Parcels, or whether the small

[1] BLM is required to consider whether both access and development of the parcels is operationally feasible. In the EA, the BLM repeatedly states that development is feasible because an oil and gas operator could horizontally drill the parcels from offsite. Horizontal drilling, however, does not provide a lessee with access over a parcel. BLM has not addressed the infeasibility of access independent of the feasibility of development as required by its directives.

percentage of non-NSO areas within the Shadow Mountain Parcels are completely surrounded by NSO stipulations. If they are, access to the non-NSO areas is simply not possible. *See* KFO RMP Appendices at p. B-5 (oil and gas lessee is prohibited from using or occupying NSO lands).

The BLM goes on to state in the EA that "access across private, state, or federal surface other than BLM would have to be negotiated between the surface owner and oil and gas operator." *Id.* Kicking the can down the road as the BLM attempts to do here may be a convenient solution, but doing so is simply not permitted by the BLM's directives. IM 2010-117 sets forth a clear mandate to consider the feasibility of access when determining whether or not to make a parcel available for leasing. When access to a parcel is not operationally feasible, as is the case here, that parcel should not be made available for leasing.

By failing to take into account the requirements set forth in IM 2010-117, BLM has impermissibly failed to follow its own directives. *Joe E. Fallini, Jr. v. BLM*, 162 IBLA 10, 38 (2004). A proper consideration of the lack of access with respect to the Shadow Mountain Parcels necessitates the removal of these parcels from leasing.

B. The BLM Failed to Weigh the High Non-Mineral Value of the Shadow Mountain Parcels Against the Low Potential Mineral Development Value

The BLM is required to consider whether the "non-mineral resource values are greater than potential mineral development values" when deciding whether to make available parcels for lease. *See* BLM Instruction Memorandum 2010-117, at III.C.4 ("IM 2010-117").

Despite this clear requirement, the BLM never weighed the high non-mineral value of any of the Grand County Parcels, including the Shadow Mountain Parcels, against the generally low potential mineral development value in the EA. Rather, BLM stated in the EA that "no section of the IM requires comparison of mineral to non-mineral resource trade-offs" and "BLM does not perform a cost benefit analysis to compare mineral and non-mineral resource values as no policy, regulation, or law requires" such a consideration. *See* Attachment F to EA at "Comments Related to Socioeconomic Issues."

Weighing the value of the non-mineral resources against the potential mineral resources, as the BLM is required to do, makes clear that the Shadow Mountain Parcels should not be made available for leasing. As explained to the BLM during its meeting with Shadow Mountain representatives, the Shadow Mountain Parcels are incredibly valuable from a non-mineral resource perspective. Valuable water resources for the entire State of Colorado (tributaries to Willow Creek Reservoir and the Colorado River) originate within the Shadow Mountain Parcels. Moreover, the Shadow Mountain Parcels support a variety of important protected and big game species and their habitat, including vital wetlands. The viewsheds throughout the Shadow Mountain Parcels are renowned and popular to both residents and tourists alike. The high percentage of NSO-stipulations throughout the Shadow Mountain Parcels (92% of Parcel

COC78289, 96% of Parcel COC78295 and 86% of Parcel COC78296) is a further indication of the high non-mineral resource value of the parcels.

In contrast to the high value non-mineral resources, the mineral development potential of the Shadow Mountain Parcels is relatively low, by the BLM's own assessment. *See* the EA at Table 3-20 (Parcel COC78289 and COC78296 are low to moderate potential and Parcel COC78295 is low potential). Thus, the non-mineral resource values clearly outweigh the mineral potential value.

Moreover, the BLM possesses the discretion to remove the parcels based upon a consideration of high value non-mineral resources. *Hawkwood Energy Agency Corp., Venture Energy LLC*, 189 IBLA 164 (Jan. 4, 2017). In *Hawkwood*, the Interior Board of Land Appeals ("IBLA") stated "BLM may exercise its discretion under the MLA to forgo or defer leasing lands for oil and gas purposes in favor of 'considerations such as wildlife, endangered species preservation, recreational use, and aesthetic or scenic values.'" *Id.* at 173 *citing George G. Witter,* 129 IBLA 359, 363 (1994); *see also* 30 USC § 226(a) ("[a]ll lands subject to disposition under this Chapter which are known or believed to contain oil or gas deposits *may* be leased by the Secretary.")(emphasis added); *see also Udall v. Tallman*, 380 U.S. 1, 4 (1965)(upholding the Secretary's broad leasing discretion under the Mineral Leasing Act). Thus, in *Hawkwood*, when the BLM cancelled several leases (after the leases had been sold) based on its consideration of the non-mineral resource values at issue: to avoid negative impacts of oil and gas development on a renowned piece of artwork, to enhance visual resource management objectives and to retain the existing character of its landscape, the IBLA concluded that the BLM was justified in its decision. *Id.* at 174.

These same considerations justify the removal of the Shadow Mountain Parcels from leasing. The Shadow Mountain Parcels are within a large intact viewshed that has been strategically preserved. Moreover, the Shadow Mountain Parcels are home to bountiful wildlife, pivotal headwaters, important wetlands and protected and endangered species. Weighing the value of these non-mineral resources against the low potential mineral development value makes clear that these parcels are simply not appropriate for leasing.

To sum, BLM is required to consider the weight of the non-mineral resource values of a parcel against the potential mineral development values. *See* IM 2010-117 at III.C.4. The BLM is required to take such consideration into account when deciding whether to make available a parcel for leasing. *Id.* Moreover, the BLM has discretion under the Mineral Leasing Act and established precedent to remove parcels from leasing based on the non-mineral resource values in an area. Considering the high value of the Shadow Mountain Parcels from a non-mineral resource perspective against the low-potential mineral development value, BLM should exercise its discretion and not make the Shadow Mountain Parcels available for leasing.

C. The BLM Failed to Conduct an Adequate NEPA Analysis

1. *The BLM Must Consider a Reasonable Range of Alternatives to Leasing all the Nominated Parcels*

When preparing an Environmental Assessment analyzing the leasing of federal minerals the BLM is required to consider various alternatives. 42 U.S.C. § 4332; *see also* 40 CFR § 1508.9(b). This is especially true when there are conflicts regarding the various uses of the subject resources. *See* BLM NEPA Handbook ¶ 8.3.4.2.

In the EA, the "Alternatives Analyzed in Detail" include only: (1) a "No Action Alternative"; and (2) a "Lease all Nominated Parcels in Conformance with the RMP" alternative. The BLM, has thus proposed a binary choice, either lease none or lease all of the parcels. This does not amount to a consideration of all appropriate alternatives to the possible course of action as required by NEPA and its implementing regulations. *See* 40 CFR § 1501.2(c). Rather, NEPA requires a consideration of more than just the "no action" alternative and the "proposed action" alternative as the BLM has proposed here. *See e.g. Davis v. Mineta*, 302 F3d 1104, 1122 (10th Cir. 2002)(holding that agency acted arbitrarily and capriciously in approving an EA which considered only the "no action" alternative and the "proposed alternative).

Here, another option the BLM should consider is removing parcels that simply do not make sense to lease like the Shadow Mountain Parcels. These parcels: (1) lack a high mineral development potential; (2) are almost entirely covered by NSO stipulations; and (3) completely lack any form of access for an oil and gas developer. In contrast to these limitations, the Shadow Mountain Parcels are: (1) incredibly valuable from a non-mineral resource value perspective; (2) are located within a prominent and popular intact viewshed (the Willow Creek Valley); and (3) are in close proximity to Arapahoe National Forest, Rocky Mountain National Park, the Continental Divide Trail, Lake Granby, Shadow Mountain Lake, the Colorado River headwaters, and other popular Colorado tourist destinations. With the above, in mind, although the BLM is required to lease federal oil and gas interests, it has the discretion to not lease areas that simply do not make sense for oil and gas development. The BLM should therefore consider an alternative of not leasing parcels like the Shadow Mountain Parcels which are not appropriate for oil and gas development based on the resource values in the area.

2. *The BLM Failed to Apply Required Stipulations*

The Kremmling Field Office Resource Management Plan (the "RMP") sets a goal of protecting visual resources when opening up lands to oil and gas development. To accomplish this goal, the RMP requires applying the CSU-22 stipulation when residential developments are near BLM-administered public lands. *See* the RMP at p. 39. The CSU-22 stipulation prohibits development "within foreground and middleground distances of BLM-managed public lands adjoining significant residential developments, communities, and municipalities." *See* the RMP

at Appendix B-41.

Despite the language in the RMP and the stipulation itself, the BLM stated in the EA that the stipulation only applies to lands within town boundaries. *See* Attachment F of the EA at Comments Related to Visual Management Resources. Contrary to the BLM's assertions, the CSU-22 stipulation applies to more than just lands within town boundaries. The plain language of both the RMP ("BLM-administered public lands *near residential developments*") and the stipulation itself ("foreground and middleground distances of BLM-managed public lands adjoining significant *residential developments, communities, **and** municiaplities*") make clear that it applies to lands outside town boundaries.

A large portion of the Shadow Mountain Parcels are within foreground and middleground distances of BLM-managed public lands which adjoin the Shadow Mountain residential development/community. The BLM must, therefore, inventory the Shadow Mountain lands and determine the additional areas within the parcels that the CSU-22 stipulation must be applied. Until it has prepared such an inventory and added the required stipulation, the BLM must defer the Shadow Mountain Parcels from leasing.

3. *The BLM Failed to Conduct a Site-Specific Analysis*

The BLM is required to conduct a site-specific analysis before it makes any irretrievable commitment of resources. *See* IM 2010-117 at III.H; *see also New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 717-718 (10th Cir. 2009) 718 ("there is no bright line rule that site-specific analysis may wait until the APD stage. Instead, the inquiry is necessarily contextual . . . [A]ssessment of all 'reasonably foreseeable' impacts must occur at the earliest practicable point, and must take place before an 'irretrievable commitment of resources' is made."). In the oil and gas context, an irretrievable commitment of resources occurs at the leasing stage. *See id.* (sale of oil and gas leases without requisite NSO stipulations constitutes an irretrievable commitment of resources); *see also* BLM Handbook H-1624-1 at p. I-2 ("[b]y law, this [irreversible] commitment occurs at the point of lease issuance.").

Here, BLM has not conducted the required site-specific analysis to determine the extent of the resource values on the Shadow Mountain Parcels, whether additional stipulations (NSO and others) are required, and ultimately, whether the parcels should be made available for lease. Until it has conducted such an analysis, the BLM must withdraw or defer the Shadow Mountain Parcels from the lease sale.

4. *The BLM's Finding of No Significant Impact ("FONSI") Impermissibly Attempts to Defer Decisions Until the APD Stage*

The BLM's FONSI is largely dependent upon its conclusions that leasing of the parcels, in and of itself, will not create any significant environmental impacts. *See e.g.* FONSI at pp. 1, 3

("[t]here are no direct impacts to resources from the act of leasing"; "[b]ecause the proposed lease sale does not involve ground disturbance, the proposed undertaking will have no effect on historic properties.")

Contrary BLM's assertions, it cannot defer analysis of the impact of oil and gas development until the APD stage. Rather, BLM must analyze reasonably foreseeable future actions resulting from federally authorized fluid minerals activities. "By law, these impacts must be analyzed *before* the agency makes an irreversible commitment. In the fluid minerals program, *this commitment occurs at the point of lease issuance.*" *See* BLM Handbook H-1624-1 at p. I-2. Along these same lines, the BLM cannot defer all National Historic Preservation Act ("NHPA") analysis until the APD stage. *Deborah Reichman*, 173 IBLA 149, 161 (2007).

With the above in mind, BLM's statement that "there are no direct impacts to resources from the act of leasing," ignores its obligation to analyze the impacts of oil and gas development prior to the issuance of oil and gas leases. Similarly, BLM cannot defer its NHPA analysis until the APD stage. If the BLM leases the Shadow Mountain Parcel prior to conducting and documenting the requisite analyses, it would be making an "irretrievable commitment of resources," without assessing the reasonable foreseeable impacts of development, in violation of NEPA. *See* 42 U.S.C. § 4332; *see also New Mexico ex rel. Richardson v. BLM*, 565 F.3d 683, 717-718 (10th Cir. 2009). Thus, until the BLM has conducted the requisite analyses and documented its findings of the impacts of oil and gas development, BLM must withdraw/defer leasing of the Shadow Mountain Parcels.

II. CONCLUSION

As set forth above, the BLM has not complied with its governing law and policies with respect to the Sale. These laws and policies require the BLM take into account certain considerations when deciding whether to make available certain parcels for lease, and ensure that BLM properly analyzes the impacts of oil and gas development. A proper consideration of the factors the BLM is required to take into account necessitates the complete removal of the Shadow Mountain Parcels. At a minimum, the BLM must defer the parcels from leasing so that the BLM can perform the required analysis and add necessary stipulations.

Very truly yours,

Michael S. Davidson